A

KUNASEKARAN RENGGAGA

v.

ASP HEISHAM HARUN, KETUA BALAI POLIS BUKIT SENTOSA & ORS

B

HIGH COURT MALAYA, SHAH ALAM
HADHARIAH SYED ISMAIL JC
[CIVIL SUIT NO: 21-156-2007]
3 AUGUST 2011

C

POLICE: *Tortious liabilities - Negligence - Duty of care - Police - Death of suspect in lock-up - Suspect found hanged with sarong cloth - Whether suicide or foul play - Suspect not monitored when in lock-up - Police Lock-up Rules not followed - Whether defendants negligent and liable for*
D *damages - Whether defendants owed suspect duty of care - Whether duty of care only arose if suspect suicide-risk - Whether government vicariously liable for suspect's death - Identity and negligence of particular officer(s) responsible for suspect's death not established - Whether fatal - Government Proceedings Act 1956, ss. 5 & 6*

E

TORT: *Negligence - Duty of care - Police - Death of suspect in lock-up - Suspect found hanged with sarong cloth - Whether suicide or foul play - Suspect not monitored when in lock-up - Police Lock-up Rules not followed - Whether defendants negligent and liable for damages - Whether*
F *defendants owed suspect duty of care - Whether duty of care only arose if suspect suicide-risk - Whether government vicariously liable for suspect's death - Identity and negligence of particular officer(s) responsible for suspect's death not established - Whether fatal - Government Proceedings Act 1956, ss. 5 & 6*

G

A 26-year-old lorry driver who was arrested by police on suspicion of being involved in a snatch-theft case, was found hanged in a police station lock-up cell four hours after his arrest. A sarong cloth was tied around his neck. The post-mortem report found no significant injuries or bruises on the body. According to the
H evidence, at the time the deceased was put into the cell, the only thing he had on his person was a T-shirt and jeans. The cell had also been checked before the deceased occupied it and no sarong cloth was found there at the time. On the day in question, as the officer in charge of the police station (the first defendant) was on
I leave, a police sergeant ('SD4') was tasked to look after affairs at the station. No lock-up sentry was assigned to monitor the

deceased, the CCTV installed in the lock-up was not functioning and various procedures prescribed under the Lock-Up Rules as outlined under the Hulu Selangor Police District Chief's Standing Orders ('the Perintah Tetap') were not followed. The deceased's father filed the instant suit on behalf of the deceased's estate against the defendants for damages for negligently causing his son's death. The plaintiff contended the deceased did not commit suicide and that the police had concocted such a story to cover up their wrong doings. He sought a declaration that the defendants had violated art. 5 of the Federal Constitution and sought special, general, exemplary and aggravated damages and costs. The defendants contended the plaintiff had no cause of action against them and that they owed the deceased no duty of care as he was not a suicide risk. They also said the failure to adhere to the lock-up procedures did not constitute negligence and that as the plaintiff had failed to both identify the police officer(s) responsible for the suspect's death and proved his/their negligence in that respect, the sixth defendant could not be made vicariously liable under the Government Proceedings Act 1956.

Held (dismissing the claim with costs):

(1) Although the police had failed to comply with the Perintah Tetap, that fact alone was not sufficient to make the defendants liable. The negligent acts of the police might be cause for disciplinary action against the officers concerned, but as far as the court was concerned the deceased had committed suicide. The plaintiff's contention that there was cover-up or foul play by the police had to be rejected. (para 28)

(2) Since the deceased was not a suicide risk, the defendants owed no duty of care to ensure he did not commit suicide. (para 31)

(3) The first defendant was on leave on the day in question. Thus, he could not be said to be negligent. The most likely candidates to be found negligent were SD4 and SD5. Both chose to disregard the lock-up rules. But their neglect could not be attributed to the 1st to the 5th defendants. Those defendants were not negligent, as there was no evidence to link the incident to them. (paras 14-15)

(4) As the plaintiff had failed to not only name the particular officer(s) alleged to be negligent but also to establish his/their liability, he had failed to comply with the requirements of ss. 5 and 6 of the Government Proceedings Act 1956 to make out a case against the sixth defendant. (para 17)

Case(s) referred to:

Funk v. Clapp [1986] 68 DLR ***(refd)***

Haji Abdul Rahman v. Government of Malaysia & Anor [1996] 2 MLJ 174 ***(refd)***

Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors [2009] 1 CLJ 663 FC ***(refd)***

Kirkham v. Chief Constable of the Greater Manchester Police [1990] 2 QB 283 ***(refd)***

Orange v. Chief Constable of West Yorkshire Police [2002] QB 347 ***(refd)***

Reeves v. Comr of Police of the Metropolis [2000] 1 AC 360 ***(refd)***

Steven Phoa Cheng Loon & Ors v. Highland Properties Sdn Bhd & Ors [2000] 4 CLJ 508 HC ***(refd)***

Legislation referred to:

Federal Constitution, art. 5

Government Proceedings Act 1956, ss. 5, 6(1)

For the plaintiff - A Sivanesan (Magesan with him); M/s A Sivanesan & Co
For the defendants - Nur Farhana Baharudin SFC

Reported by Ashok Kumar

JUDGMENT

Hadhariah Syed Ismail JC:

Introduction

[1] On 27 October 2006 at about 3.30pm, the plaintiff's deceased son, Suresh a/l Kunasekaran was found to have hanged himself with "a kain sarong" from the steel bar in the lock up cell of Balai Police Bukit Sentosa where he was detained shortly after his arrest on suspects, involvement in a snatch theft case. The plaintiff brought this action against the Ketua Balai Polis Bukit Sentosa, Ketua Polis Daerah Selangor, Ketua Polis Negeri Selangor, Ketua Polis Negara, Timbalan Menteri Dalam Negeri and Kerajaan Malaysia for damages. The cause of action is negligence. Particulars of negligence pleaded are: failure to ensure the safety of the deceased while under detention in the lock up,

failure to comply with the Police Act, failure to install functional CCTV to monitor the movement of the deceased, failure to carry out the duty as police officers and failure for not wanting to know what is happening in Balai Polis Bukit Sentosa. *Vide* this action, the plaintiff claimed for a declaration that the defendants had violated art. 5 of the Federal Constitution; special damages of RM519,120 for loss of dependency, bereavement, funeral expenses and cost of extracting Letters of Administration; general damages of RM800,000 for trespass, harassment, unlawful detention, pain and suffering; exemplary and aggravated damages of RM200,000; interest and costs. The defendants denied liability contending the plaintiff had no cause of action against them; that they had no duty of care to the deceased, that the deceased had committed suicide and the Government of Malaysia, is not vicariously liable until the requirements of ss. 5 and 6 of the Government Proceedings Act 1956 is satisfied in that liability against the police officer named and allegedly to be negligent must first be established.

Facts

[2] Briefly the facts are as follows. On 27 October 2006 at about 11.30am, the deceased was arrested at a coffee shop in Taman Bukit Teratai by Lance Corporal Subramaniam (SD2) and his team. This arrest was made in relation to Selayang Report No.1168/06. From there he was brought back to Bukit Sentosa Police Station for interrogation. SD2 testified that from the time of arrest till detention, the deceased gave his cooperation to the police. After the interrogation, at about 1.15pm, he was brought and put into the lock up cell. Prior to that, SD2 confirmed he did a body search on the deceased and found nothing incriminating on him. The deceased was wearing a t-shirt and dark jeans. SD2 also confirmed the deceased did not bring with him a kain sarong. SD2 further confirmed he had checked the lock up cell and found there was no kain sarong inside it prior to putting the deceased inside the lock up. It was also in evidence that the deceased had not shown any sign of him wanting to commit suicide. The plaintiff himself agrees the deceased had never attempted to commit suicide before although he had been arrested by the police on a few occasions previously. On the evidence before the court, I hold that the deceased is not a suicide risk. After the deceased was detained in the lock up, SD2 left the police station. The

officer in charge of the Police Station at the material time is ASP Heisham (SD1), the first defendant in this case. SD1 was on leave on the day of the incident. In his absence, the task of looking after the daily affairs and administration of the police station was left to Sergeant Jamaludin Abdul Jalil, (SD4). What happened was, after the deceased was placed in the lock up cell, no lock up sentry was assigned to monitor the deceased's movement. The police personnel at the Balai seems to be pre-occupied with their own business that they left the deceased unattended. At about 3.30pm, when the deceased is to be taken out from the lock up cell, they found he had hanged himself with a kain sarong tied to his neck. Photographs tendered confirmed this fact. Post mortem report stated cause of death as hanging. There were no significant injuries or bruises found on the deceased's body. This indicate no criminal force was inflicted on the deceased. Thus, foul play by the police must be ruled out.

[3] It is an undisputed fact that whenever a detainee is put in a lock up, there are certain rules and regulations the police had to comply to safeguard the health and safety of the detainees whilst they are under the custody of the police. One such rule is the Perintah Tetap Ketua Polis Daerah Hulu Selangor (Prosedur Mengurung Orang-Orang Tahanan Dalam Lokap Polis). The relevant part of the rules insofar as it relates to this case are:

11. Ketua Pejabat Pertanyaan adalah bertanggungjawab ke atas keselamatan orang-orang tahanan yang berada di lokap. Oleh demikian, peraturan-peraturan berikut mesti dipatuhi sebelum seseorang yang ditangkap itu dimasukkan ke dalam lokap:

    11.1. Ketua Pejabat Pertanyaan hendaklah merujuk kepada KPD atau KPS untuk mendapat kebenaran sebelum memasukkan orang tahanan ke dalam lokap.

    11.4. Semua pakaian melainkan pakaian menutup auratnya (seluar pendek) hendaklah ditanggalkan dan dicatitkan didalam Buku Daftar barang-barang kepunyaan orang-orang tahanan. Pakaian menutup aurat tidak termasuk barang-barang seperti tali pinggang, serban, tuala kecil, seluar dalam yang bertali dan lain-lain barang membahayakan.

    11.9. Lokap mesti diawasi dengan cermat oleh Ketua Pengawal Lokap untuk menentukan supaya tiada barang-barang yang boleh digunakan oleh orang tahanan untuk membahayakan dirinya atau tahanan lain.

Untuk Lokap Balai Polis Bukit Sentosa yang mempunyai CCTV terdapat prosedur tambahan yang dikenakan bagi semua petugas-petugas pengawalan lokap. Prosedur-prosedur tambahan adalah seperti berikut:

14.1. Ketua/Penolong Pejabat Pertanyaan dan Anggota Bilik Gerakan yang baru masuk tugas, sebelum mencatitkan kehadirannya ke dalam Buku Perharian Balai hendaklah mengujicuba semua system CCTV dan memastikan semua system dalam keadaan berfungsi. Mereka hendaklah menelefon dan bercakap dengan pegawai lokap yang bertugas dan dapatkan laporan keadaan lokap yang terkini dari Pengawal Lokap tersebut. Sesudah system diujicuba dan laporan Pegawai Lokap diperolehi, butir-butir ini hendaklah dicatitkan ke dalam Buku Perharian Balai dan Buku Log CCTV.

[4] As evident later, the police personnel at Balai Polis Bukit Sentosa had blatantly disregarded the Perintah Tetap. Apart from making an entry in the Buku Perharian about the time they had put the deceased into the lock up, there was no record of the examination done on the detainee and whether the lock up is empty of anything incriminating. To make matters worse, the officer in charge of the police station was not informed of the deceased's detention in the lock up, the CCTV installed in the lock up was not functioning or not switched on and no explanation for the existence of the kain sarong found on the deceased. Questions of how and why did the police did not comply with the Perintah Tetap forwarded to the Ketua Polis Balai (SD1) received an answer of "Saya tidak tahu kerana saya bercuti pada hari itu". When the same question is posed to the Investigating Officer, ASP Naemah (SD3), the response was "Saya tidak boleh jawab or "Saya tak ingat". Whilst I cannot blame SD1 for his answers because he was on leave at the material time, the same cannot be said of SD3. Having seen and heard SD3 giving evidence, I find her evidence is most unsatisfactory. The reason being most of her evidence is based on memory or her opinion only. She told the court she did not have the Investigating Paper (IP) with her. She also said she had not had the chance to read the IP to refresh her memory before coming to court. Needless to say, I did not give much weight to her evidence. I shall deal with her evidence later.

[5] As I mentioned earlier, the police had disregarded the Perintah Tetap, especially in relation to CCTV and ensuring no incriminating item that could be used by the detainee to harm himself reached the lock up. With regard to CCTV, I find the answers given by the defendants' witnesses varies from "CCTV do not have tape", "CCTV was not on" and "CCTV cannot tape recorded what is happening in the lock up". I reproduce below the answers given by the witnesses.

(i) SD1: Sepanjang saya bertugas sebagai Ketua Polis Balai sejak 1 February 2005 CCTV memang tidak dibekalkan dengan tape.

(ii) SD2: CCTV memang berfungsi. Tapi pada hari itu tidak di "on" kan, maksud saya tape.

(iii) SD3: CCTV berfungsi dengan baik, tetapi tidak dapat merakamkan apa-apa kerana tidak dibekalkan dengan tape recorder.

(iv) SD5: Tidak tahu samaada CCTV berfungsi atau tidak kerana telah di "off" kan.

[6] My response to the above answers is this. No matter how hard these witnesses tried to impress the court that the CCTV was functioning, I reject their evidence as it is ridiculous to have a CCTV without tape and at the same time alleged it is functioning. The Perintah Tetap states the police must commission, test and switch on the CCTV. None of those were done in this case. I therefore made a conclusion that the CCTV, though installed was not functioning.

[7] I shall now deal with the issue of the mysterious existence of the "kain sarong" found on the deceased. SD2 as the arresting officer who put the deceased into the lock up told the court that he had checked the lock up and found no kain sarong therein. SD4 also corroborate SD2's evidence in that he (SD4) together with his colleague En Dahlan had checked the lock up one day earlier and found no kain sarong inside the lock up. Obviously neither SD2 nor SD4 could give an explanation as to how this kain sarong suddenly appeared and got into the deceased's hand. Despite the scenario given by these two witnesses, surprisingly, the Investigating Officer, SD3 came up with a theory that the

kain sarong was probably a left behind item by Indonesian inmates. She further invented a story that she had purportedly gone to Sungai Buloh prison trying to interview the Indonesian inmates but couldn't get anything out of it apart from saying she received a negative feedback. When confronted with the evidence of SD2 and SD4, she finally agreed that it was only her opinion, which was not substantiated by any proof. I, therefore rejected SD3's evidence on the issue of kain sarong. My conclusion is the police cannot explain how the kain sarong came into the hand of the deceased. One thing I am definitely certain and which I think the police cannot argue is this. The kain sarong could not have fallen from the sky. There is no way the deceased could have grabbed it somewhere. The thing is the kain sarong would not have been found on the deceased without the negligence of the police. With no explanation forthcoming from the police, the irresistible conclusion must be the police on duty that day are negligent. In the end, the so-called investigation by SD3 does not help the court or the plaintiff. Till to date the existence of the kain sarong remains unanswered and a mystery.

[8] At this juncture, I think it is appropriate for me to state the finding of inquest made by the Coroner Court on 5 July 2010, in particular on the issue of negligence as follows:

> Walaubagaimanapun terdapat unsur-unsur kecuaian dalam urusan penahanan simati di dalam sel lokap Balai Polis Bukit Sentosa. Ini adalah disebabkan oleh ketidakpatuhan terhadap prosedur penahanan OKT ataupun suspek di dalam lokap ataupun sel.
>
> Kecuaian tersebut adalah:
>
> i) Memasukkan suspek atau OKT tanpa pengetahuan ASP Heisham iaitu Ketua Balai Bukit Sentosa dan Penolong Ketua Balai Bukit Sentosa iaitu Sarjan Jamal.
>
> ii) Tiada sentry ditugaskan untuk mengawasi tindak tanduk suspek/OKT di dalam lokap.
>
> iii) Walaupun terdapat CCTV, ianya tidak berfungsi.
>
> iv) Semasa simati ditahan, tiada sebarang pemeriksaan atau lawatan dilakukan oleh SP4 dan SP6 yang mana telah mengetahui bahawa tiada sentry pada hari tersebut.

[9] With the above background facts, the plaintiff alleged his deceased son did not commit suicide. To him, it is more a case of the police having concocted the story of his son committing suicide to cover up their own mess.

Issues

[10] Although each party has formulated a long list of issues to be tried by this court, I was of the view that the real issues are only these two:

(i) Whether s. 5 & 6 of the Government Proceedings Act 1956 have been complied with by the plaintiff?

(ii) Whether the defendants are liable for the death of the plaintiff's deceased son?

The First Issue

[11] Section 5 reads:

> Subject to his Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.

[12] Section 6(1) reads:

> No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally.

[13] Learned Federal Counsel for the defendants submits that pursuant to the provisions in ss. 5 and 6 above, in order for the 6th defendant to be held vicariously liable for the act or neglect of any police officer, the plaintiff must not only name the officer allegedly to be negligent but his liability must also be established first. She further submits that in this case, the plaintiff has failed to name the specific police officer who is alleged to be negligent

but only named ASP Heisham, Superintendent Frederick, Dato' Ismail Hj Omar, Tan Sri Musa Hassan and Deputy Minister of Home Affairs. She also further submits these defendants are not public officers who are alleged to be negligent. In fact ASP Heisham was on leave on that fateful day. Thus, she concluded the plaintiff had no cause of action against the defendants. The following cases was cited to support her contention.

(i) *Kerajaan Malaysia & Ors v. Lay Kee Tee & Ors* [2009] 1 CLJ 663.

(ii) *Steven Phoa Cheng Loon & Ors v. Highland Properties Sdn Bhd & Ors* [2000] 4 CLJ 508.

(iii) *Haji Abdul Rahman v. Government of Malaysia & Anor* [1996] 2 MLJ 174.

[14] In reply, Mr Sivanesan for the plaintiff contended that the cases referred to by Federal Counsel is distinguishable from the facts of this case and that it is not necessary to name the tortfeasor as the plaintiff has pleaded "Defendan dan/atau pengkhidmat/penggaji/pekerja mereka. He further submits that due to the mysterious way the death had occurred, the plaintiff cannot pick one or two police officers from Balai Polis Bukit Sentosa and named them. To the plaintiff, the 1st defendant is liable for the wrong doings of his subordinates.

[15] I had to disagree with the plaintiff's contention. In para. 23 of his statement of claim, the plaintiff had pleaded that the 1st defendant was negligent in his duty of care towards the deceased. The negligent acts referred to by the plaintiff must relate to the failure in putting a lock up sentry, failure to ensure CCTV is functioning, failure to monitor the deceased's movement and failure to ensure the detainee did not obtained the kain sarong to hang himself. But the established fact is the 1st defendant was on leave on that day. So how can the 1st defendant be said to be negligent. The acts or neglect complained off here must be attributed to the police officer on duty at the material time. The way I see it, the most likely candidate to be found negligent are Sergeant Jamaludin Abdul Jalil (SD4) and Sergeant Saabiah (SD5). Both of them knew too well about the procedure to be followed whenever a detainee is put in a lock up cell. Yet they

chose to disregard the rules. Thus, the neglect of SD4 and SD5 cannot be attributed or had anything to do with Ketua Polis Balai Bukit Sentosa, Polis Daerah Hulu Selangor, Ketua Polis Negeri Selangor or Ketua Polis Negara or Deputy Minister of Home Affairs. There is no way these defendants are negligent. There is no evidence to link the incident to the defendants. On this ground alone, the plaintiff's claim against the 1st to 5th defendants must fail.

[16] With regard to the 6th defendant, from my reading of ss. 5 and 6 of the Government Proceedings Act 1956 and the authorities cited by Federal Counsel, I find all these cases have held that:

(i) In any claim in tort against the Government, the officer of the government who was responsible for the alleged tortuous act must be made a party and his liability be established before the government can be made liable vicariously as principal.

(ii) It is absolutely necessary and essential to identify and named the particular officer or officers whom the plaintiff alleged committed the negligence or tortuous wrong.

[17] Although the facts of the case in the authorities cited by the defendants differ from the present case, the principle of law on vicarious liability are the same and that is, the plaintiff must establish the liability of the particular officer first before there could be vicarious liability. I therefore chose to follow the decisions in the three cases cited by Federal Counsel and since the plaintiff has failed not only to name the particular officer or officers allegedly to be negligent but also failed to establish their liability, I hold that the plaintiff has failed to comply with the requirement of ss. 5 and 6. It follows then a case was not made out against the 6th defendant as well. Assuming I was wrong on the first issue, I shall now proceed to examine the second issue.

Second Issue

[18] Mr Sivanesan submits that based on the failure of the police to adhere to their own procedure and the mysterious existence of the kain sarong, the plaintiff has made out a case of negligence against the defendants. On the other hand, Federal Counsel submits that failure to adhere to procedure does not constitute

negligence. The plaintiff must proof there exists a duty of care, breach of duty, forseeability of damage and causation. She further submits that the police owed a duty to take steps to avoid the detainee from committing suicide only in cases if the detainee is a suicide risk which is not the case here. *Orange v. Chief Constable of Yorkshire* [2002] QB 347 was cited in support of this contention. I agree entirely with Federal Counsel's submission. Before I state the reasons why I agree with the defendants' contention, allow me to refer to few English cases because that would make it easier for me to explain.

The Law

[19] Both parties referred this court to an English case of *Orange v. Chief Constable of West Yorkshire Police* [2002] QB 347. The facts in *Orange*'s case is this. The plaintiff's husband was arrested for being drunk and disorderly at 5.40am and placed in a police cell inside the door of which was a gate with vertical steel bars and a horizontal crossbar. He was allowed to keep all his clothing, including his belt and was monitored regularly by visits at 30 minute intervals and between visits by closed circuit television, although the gate could not be seen on the television screen. The police did not regard him as a suicide risk. At about 9.30-9.40am, a decision was made to release him. But he was found to have hanged himself by his belt from the horizontal bar on the gate. The plaintiff brought an action against the chief constable alleging that the chief constable had been negligent, *inter alia*, in allowing the deceased to retain his belt and in failing to provide a safe environment. The court of first instance dismissed the claim on the ground that no duty of care was owed to protect the deceased from suicide since the police officers had no reason to believe he was a suicide risk. The plaintiff appealed to the Court of Appeal. One of the issues to be considered by the Court of Appeal is [what is the scope of duty of care owed by the police/to what extent is the duty of care owed by the police to take reasonable care for the health and safety of a person in their custody.]

[20] Finding the arguments put forward by the parties in *Orange*'s case is interesting and stimulating, I reproduce them below. Queen's counsel for the plaintiff submit the duty of care the law imposed on the police are as follows:

A (i) The police owe a duty to take reasonable care to prevent all prisoners from committing suicide while in custody. Such a duty is owed because custodial situation is an inherently dangerous one in that it results in abnormal stresses and strains which produce an enhance risk of suicide in all
B prisoners. A person in prison is more likely to injure himself or commit suicide than a person at liberty and it is difficult to determine which prisoners are at risk.

(ii) What is reasonable care will depend on the nature of the
C individual prisoner and the circumstances in which he is detained.

(iii) Whether a breach of the duty of care has been established will always depend on the facts of the particular case.

D (iv) The police are under an additional duty to take all reasonable steps to ensure that cells are so designed as to minimize the opportunity for detainees to kill or injure themselves while in custody.

E **[21]** It is noted that the duties listed above will find favour with most lawyers in this country.

[22] Defending their action or inaction, the arguments put forward by the police are:

F (i) Generally, the law will not impose a duty on a person to prevent someone else from self inflicted harm. Before imposing liability on a defendant for the independent deliberate act of another person the court must determine that the defendant could reasonably foresee that act.

G

(ii) What the police must reasonably have foreseen was that the prisoner was a suicide risk.

(iii) No duty of care arises where suicide is unforeseen and
H unforeseeable, and it is not fair, just or reasonable to impose such a duty.

(iv) Asserting a duty in respect of the cell itself cannot avoid the need to satisfy a foresee ability test for the imposition of a duty of care, otherwise a strict liability tort would be created.

I

(v) Unless the deceased was a known suicide risk, he was not at risk from the cell in which he was detained.

(vi) If a duty of care was owed to the deceased, his suicide did not break the chain of causation but a finding of contributory negligence would be justified.

[23] To answer the issue, the Court of Appeal had referred and discussed three cases. The first case is *Kirkham v. Chief Constable of the Greater Manchester Police* [1990] 2 QB 283. In that case, damages were awarded to the widow of a prisoner who had committed suicide shortly after being handed over to the prison authorities from police custody. The police knew that he was a suicide risk and that he had made recent attempts to commit suicide but did not communicate that information to the prison authorities, in particular failing to complete the appropriate form which would have identified to the prison authorities that the deceased was a suicide risk. The deceased had been diagnosed as suffering from clinical depression. The judge held that the police were liable. The Court of Appeal upheld that decision on the basis that the responsibilities, which the police assumed towards the deceased when they took him into custody and handed him over to the prison authorities, included an obligation to pass on the information that he was a suicide risk. The court further considered that neither the defence of *volenti non fit injuria nor ex turpi causa non oritur* action could avail the police. With regard to the importance of the fact that the deceased was clinically depressed, Llyod LJ had this to say:

> So I would be inclined to hold that where a man of sound mind commits suicide, his estate would be unable to maintain an action against the hospital or prison authorities, as the case might be. *Volenti non fit injuria* would provide them with a complete defence … But in the present case, Mr Kirkham was not of sound mind.

[24] Another case of the deceased was known to be a suicide risk is *Reeves v. Comr of Police of the Metropolis* [2000] 1 AC 360. The deceased had been brought to the police station shortly after midday having tried to kill himself in the cell at the magistrates' court. He was examined by a doctor, who, whilst concluding that he was not suffering from any mental illness or other mental disturbance, considered him to be a suicide risk and left instructions that he should be observed frequently. Within

25 minutes of his being returned to his cell after being examined by the doctor, he had managed to hang himself from material from his shirt which he had secured through the open spy-hole to the cell. The judge concluded that the police had been negligent. He held, however, that the deceased had been of sound mind, and in those circumstances, his suicide was a *novus actus interveniens* and dismissed the action. The decision was overturned by the Court of Appeal on the grounds that the suicide being the very act against which the police had been required to guard, did not constitute a *novus actus interveniens*. However, two principles of law of paramount importance emerged from the reasoning advanced by Lord Hoffmann and Lord Hope. The relevant passage of what Lord Hoffmann had said was quoted at p 356 in *Orange*'s case and it reads:

> This argument is based upon the sound intuition that there is a difference between protecting people against harm caused to them by third parties and protecting them against harm which they inflict upon themselves. It reflects the individualist philosophy of the common law. People of full age and sound understanding must look after themselves and take responsibility for their actions. This philosophy expresses itself in the fact that duties to safeguard from harm deliberately caused by others are unusual and a duty to protect a person of full understanding from causing harm to himself is very rare indeed.

Further down, at P 358, Court of Appeal quoted a passage made by Lord Hope which reads:

> The act of suicide may be both unforeseen and unforeseeable.

[25] In *Funk v. Clapp* [1986] 68 DLR, the deceased husband of the plaintiff had been arrested for driving whilst impaired by drink and placed in custody. He was subsequently found dead, having hanged himself by his belt. The allegations were that, although he was not known to be a suicide risk, nonetheless the standard procedure in the Police Operating Manual had not been followed. It was alleged that he had not been searched properly, hence the fact that he still had his belt available to him, and he had not been monitored in the cell with the frequency which the manual required. The judge at first instance had held that there was no case for the police to answer. The Court of Appeal held that there was evidence of a breach of duty, both in relation to the failure to remove the belt, and in failing to monitor the deceased

in accordance with the manual. At the retrial, the judge at first instance held that the failure to find the belt did not amount to a breach of duty. He concluded that the deceased had been determined to commit suicide, although that was not in any way apparent to the police, and that he had in some way hidden the belt. He further found that although the deceased had not been monitored as often as was required by the manual, that had not had any causative effect. He concluded that the deceased, having been determined to commit suicide, would have done so even if he had been monitored at appropriate intervals. The Court of Appeal dismissed the appeal.

[26] Having considered all the above principles, Latham LJ (CA) made the following remarks:

1. There is no doubt that a custodian owes a duty of care to those taken into custody. The duty is to take reasonable care for that person's health and safety. In determining the extent of that duty, it is clearly relevant to take into account the fact that there is increased risk of suicide amongst such prisoners. But that does not mean that suicide is a foreseeable risk in relation to every prisoner. As Lord Hope said in Reeves's case, suicide can be both unforeseen and unforeseeable. Nor do we consider that it would be fair, just and reasonable to impose upon either the police or the prison authorities a general obligation to treat every prisoner as if he or she were suicide risk. The consequence would be an unacceptable level of control and precaution, not only as an obligation placed upon the authorities, but also as an imposition on the individual prisoner.

2. It seems to us that the right balance is struck by recognizing that "a duty to protect a person of full understanding from causing harm to himself is very rare indeed". In my judgment, the increased risk of suicide amongst prisoners can properly be said to give rise to an obligation, within the general duty of care the custodian has for the prisoner's health and safety, to take reasonable steps to identify whether or not a prisoner presents a suicide risk. The obligation to take reasonable care to prevent a prisoner from taking his own life deliberately only arises where the custodian knows or ought to know that the individual prisoner presents a suicide risk.

A 3. We recognize that it is very difficult to determine whether or not a particular person may present a suicide risk. But we do not consider that the fact it is difficult, is a reason for treating suicide as foreseeable in the case of every prisoner. The difficulty in recognizing the risk does not make suicide either
B more or less foreseeable in any given case.

[27] Applying the above principles to the facts of *Orange*'s case, the Court of Appeal dismissed the appeal. As the deceased was not found to be of a suicide risk, the court held the police were
C not negligent in permitting the deceased to retain his belt; the chief constable did not owe him a duty of care to prevent him from taking his life deliberately; whilst the gate itself did not comply with the recommendations contained in the Home Office circulars, its presence in the cell and the fact that the deceased had been
D placed in that cell did not amount to a breach of any duty of care owed to him.

[28] Reverting to the facts of the present case, there were ample evidence before the court that the deceased is not a suicide risk. This is an undisputed fact. Thus, following the principles of law
E laid down in *Orange v. Chief Constable of West Yorkshire* [2002] QB 347, I hold that the police did not owe a duty of care to ensure the deceased would not commit suicide. The duty of care does not arise as the deceased is not a suicide risk. I further hold, although the police have failed to comply with Perintah Tetap
F Ketua Polis Daerah Hulu Selangor, that fact alone is not sufficient to make the defendants liable. The negligence act of the police may be a cause for disciplinary action to be taken by the police department against their officers. But as far as this court is concerned, I had no doubt whatsoever that the deceased had
G committed suicide by hanging. I had to reject the plaintiff's contention that there was a cover up or foul play by the police. On those grounds, I hold the plaintiff have failed to prove his case against the defendants.

H **Damages**

[29] For the sake of completeness, I shall now assess the quantum of damages. The plaintiff claimed for:

I (i) Special damages of RM519,120.

(ii) General damages of RM800,000

(iii) Exemplary damages of RM200,000

[30] However, during the trial, evidence led by the plaintiff is confined to loss of dependency only. Evidence on the deceased's income comes from the plaintiff himself. The deceased is said to be working as a lorry driver with an income of RM1,200 per month. The employer was not called on the ground the company has been wound up. Neither was any pay slip or salary voucher produced to support his contention. Reason given was the company never issued pay slip. Based on the evidence thus far, the plaintiff claimed the deceased gave him RM1,000, per month. Evidence on the deceased work and his income was challenged by the defendants. In particular the defendants' contended it is impossible for the deceased who was a drug dependent to give RM1,000 per month when his income is only RM1,200. It is just not possible for the deceased to survive with RM200 per month. I agree with the defendants' contention on the amount of contribution. Since evidence led show the deceased was a healthy young man of sound mind, I find there is nothing extra ordinary or impossible to believe if the deceased is alleged to have been working prior to his death. I therefore accept the plaintiff's evidence that the deceased worked as a lorry driver. But with regard to the contribution, I was of the view with the rising costs of living, at the most the deceased could only afford to contribute RM300 per month to the plaintiff. The deceased was 26 years old at the time of his death. Therefore the applicable multiplier is 16 years. The rest of the claim is not proven and not allowed by the court.

Conclusion

[31] This is an unfortunate case of a detainee committing suicide whilst in the care and custody of the police. Although negligence is proved against the police but that fact alone is not sufficient to hold the defendants liable. Since the deceased is not a suicide risk, the defendants owed no duty of care to ensure the deceased did not commit suicide. Therefore, on the balance of probability, the plaintiff has failed to prove his case against the defendants. Consequently, I dismiss the plaintiff's claim with costs to be taxed.